IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

No. 76-487

GLENN MACK BELL,
Appellant,

v.

JOE S. HOPPER, WARDEN,
GEORGIA STATE PRISON,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

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28 U.S.C. § 1257

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NO. 76-487

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MOTION TO DISMISS

The appellee, through the Attorney General of the State of Georgia, moves to dismiss the above-styled appeal on the grounds that: (1) The decision of which Appellant seeks review in this Court is not a final judgment or decree within the meaning of 28 U.S.C. § 1257 because of the pendency of further proceedings in the Georgia courts; (2) The State statute purportedly drawn into question and upheld by the Georgia Supreme Court was not challenged in a timely manner by Appellant and (3) Appellant has not exhausted his available State remedies pursuant to 28 U.S.C. § 2254 in this habeas corpus proceeding.

STATEMENT OF THE CASE

Appellant seeks to have this Court review the decision of the Georgia Supreme Court in Bell v. Hopper, 237 Ga. 189, 227 S.E.2d 41 (1976). Appendix A. In that decision the Georgia Supreme Court remanded Appellant's habeas corpus case to the Superior Court of Tattnall County, Georgia, for a second evidentiary hearing on the circumstances surrounding Appellant's release from the Georgia prison system in September 1975, following service of approximately 18 months of a life sentence for armed robbery imposed in the Superior Court of Clayton County, Georgia on March 28, 1974. Appellant's conviction and sentence had been upheld on direct appeal. Bell v. State, 234 Ga. 473, 216 S.E.2d 279 (1975).

Appellant filed his petition for habeas corpus in the Tattnall Superior Court, pursuant to Ga..Code Ann. § 50-127 (3), and appeared in that court for an evidentiary hearing on December 17, 1975. Evidence adduced at that hearing reflected that Appellant had been discharged from the Georgia State Prison on September 9, 1975, and had been taken back into custody on October 22, 1975. Appendix B, p. A6. The habeas corpus court found no evidence to show that Appellant's life sentence had been commuted or otherwise terminated or that Appellant had been pardon or paroled. Appendix B, p. A7. In the absence of any such evidence, the court

found that Appellant's release from custody in September 1975 was erroneous. The court concluded that Appellant's subsequent arrest in October 1975 was lawful and that Appellant was properly in the custody of the Respondent-Appellee pursuant to the 1974 life sentence. Appendix B, p. A8.

In vacating the judgment of the habeas corpus court, the Georgia Supreme Court's majority opinion expressed disagreement with the findings and conclusions of the habeas corpus court, and remanded the case to the superior court for further evidentiary proceedings. Appendix A, p. A2. The majority opinion contained no discussion of the merits of Appellant's contention that he had been denied Due Process by his arrest and reincarceration following his release.

Appellant then filed a Motion for Rehearing in the Georgia Supreme Court, challenging for the first time the constitutionality of Ga. Code Ann. § 6-1610, on the ground that its application to him denied him due process. Appendix F. The statute challenged by Appellant provides for entry of the Supreme Court's decisions on the minutes of the court, and gives the court the authority to "award such order and direction to the cause in the court below as may be consistent with the law and justice of the case." Ga. Code Ann. § 6-1610. The Supreme Court summarily denied the Motion for Rehearing without

opinion. Appendix D. Appellant then filed his Notice of Appeal to this Court. Appendix E.

ARGUMENT

1. THIS CASE IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT BECAUSE THE STATE COURT DECISION WAS NOT A FINAL JUDGMENT OR DECREE WITHIN THE MEANING OF 28 U.S.C. § 1257.

A fundamental limitation on this Court's jurisdiction to review a decision by the highest court of a State is contained in the first words of 28 U.S.C. § 1257, which provides for certain types of review of "[f]inal judgments or decrees rendered by the highest court of a State." Appellant attempts to rely upon Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975) to support his argument that the Georgia Supreme Court's decision in his case was final for purposes of bestowing jurisdiction upon this Court. Appellant argues that his case falls within that opinion's third category of cases in which this Court will take jurisdiction of an appeal or a petition for certiorari notwithstanding the pendency of additional proceedings in the State court. Id. at 481.

It is apparent, however, from an examination of the Georgia Supreme Court's decision in Bell v. Hopper, 237 Ga. 189, 227 S.E.2d 41 (1976) that Appellant's case does not fit within any of the categories set forth in the Cox Broadcasting decision. The Georgia Supreme Court remanded the case for a second evidentiary hearing in the habeas corpus court, specifically on the questions of whether Appellant's sentence had been commuted or had otherwise expired, whether Appellant had been pardoned or paroled, and whether Appellant's current confinement was legal. Appendix A, p. A2. Clearly, the majority of the Georgia Supreme Court reserved judgment, pending the further development of the record, on Appellant's contention that he was denied due process by his arrest and imprisonment following his release.

In contrast, the cases relied upon by Appellant are those in which "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." Cox Broadcasting Corp. v. Cohn, supra, 420 U.S. at 481. Should Appellant not prevail on the merits of his contentions after a second evidentiary hearing in the habeas corpus court, there exists no barrier to his seeking review on these points in the Georgia Supreme Court. Should Appellant prevail, the issues would not be mooted and could be

raised on appeal by the Respondent under the Georgia habeas corpus statute. Ga. Code Ann. § 50-127 (11) (1976 Supp.). Cf. California v. Stewart, 384 U.S. 436 (1966).

The situation in Appellant's case is somewhat analogous to that found in Costarelli v. Massachusetts, 421 U.S. 193 (1975). Finding that there had been no adjudication of the case in the Supreme Judicial Court of Massachusetts, the Court rejected the contention that such review was inadequate, pointing out that the State provided a method for asserting the constitutional claim in the trial court and in preserving the claim for review in the highest court of Massachusetts. In response to the argument that the claim might become moot under the State's two-tier criminal trial system, the Court stated that this circumstance "does not mean that (Appellant) may draft his own rules of procedure in order to raise the claim only before those Massachusetts courts which he deems appropriate." Id. at 197. Sub judice, Appellant, apparently not desirous of further factual development on the circumstances of his release from the Georgia State Prison in September 1975, seeks to circumvent the Georgia Supreme Court's decision to remand his case for

further proceedings. Appellant has available a mechanism for review of any adverse judgment rendered in the Superior Court of Tattnall County, Georgia. Ga. Code Ann. § 50-127 (11) (a). This Court should therefore refuse to review the Georgia Supreme Court's decision on the ground that it is not a final judgment or decree within the meaning of 28 U.S.C. § 1257.

2. APPELLANT'S CHALLENGE TO THE CONSTITUTIONALITY OF GA. CODE § 6-1610 WAS NOT TIMELY.

Appellant first raised the issue of the allegedly unconstitutional application of Ga. Code § 6-1610 in his Motion for Rehearing in the Georgia Supreme Court. Appendix F. The Supreme Court denied Appellant's motion without opinion. Appendix D. Appellant's petition for habeas corpus and his appeal to the Georgia Supreme Court in no way raised any issue of the constitutionality of this statute, which provides for entry of the appellate court's decisions on the minutes of the court, and for the court's authority to give such direction to the lower court as may be appropriate. Ga. Code Ann. § 6-1610.

As this Court has held on numerous occasions, raising a federal question for the first time in a petition for rehearing addressed to the highest State court is insufficient unless the court actually entertained the petition and expressly decided the question. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Hansen v. Denckla, 357 U.S. 235 (1958); Herndon v. Georgia, 295 U.S. 441 (1935). The Georgia Supreme Court summarily denied Appellant's Motion for Rehearing without opinion, and Appellant cannot bring himself within any exception to the often-stated general rule. This Court should therefore dismiss Appellant's contentions concerning the allegedly unconstitutional application of this statute.

3. THIS COURT SHOULD DISMISS THE APPEAL BECAUSE APPELLANT HAS NOT EXHAUSTED HIS AVAILABLE STATE HABEAS CORPUS REMEDIES.

As an additional reason for dismissal, Appellee submits that adherence to the principle of exhaustion of State remedies codified in 28 U.S.C. § 2254 virtually mandates dismissal of this appeal. This Court has recently emphasized the continued strength and viability of the exhaustion doctrine. Pitchess v. Davis, 421 U.S. 482 (1975). See Picard v. Connor, 404 U.S. 270 (1971); Fay v. Noia, 372 U.S. 391, 419-20 (1963).

As previously discussed in connection with the lack of finality of the Georgia Supreme Court's decision, Appellant's habeas corpus case was remanded to the Superior Court of Tattnall County for further evidentiary proceedings. Should Appellant not prevail on the merits of his contentions, he has the remedy of a second appeal to the Georgia Supreme Court. Appellant thus has an available State remedy and has not been required to "file repetitious applications in the State courts." Humphrey v. Cady, 405 U.S. 504, 517, n. 18 (1972). See also Francisco v. Gathright, 419 U.S. 59 (1974).

Appellee submits that this Court's consideration of the merits of Appellant's contentions at this juncture in his habeas corpus proceedings would do violence to the doctrine and policy of the exhaustion requirement codified in 28 U.S.C § 2254.

CONCLUSION

For all of the above and foregoing reasons, this Court should dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, one of the attorneys for the appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the opposing party in this action with three copies of the foregoing Motion to Dismiss by depositing three copies of the same in the United States mail, with first class postage prepaid, addressed as follows:

Mr. Paul S. Weiner
Mr. Paul McGee
226 North McDonough Street
Post Office Box 698
Jonesboro, Georgia 30237

This 10th day of November, 1976.

JOHN C. WALDEN, Senior
Assistant Attorney General